

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant :	Nicholas Grant Rasmussen, et al.	Art Unit :	2123
Patent No. :	7,472,046	Examiner :	Russell L. Guill
Issued Date :	December 30, 2008	Conf. No. :	6976
Serial No. :	10/608,935		
Filed :	June 27, 2003		

Title : APPARATUS AND METHOD OF SIMULATING THE MOVEMENT OF ELEMENTS THROUGH A REGION OF 3D SPACE

MAIL STOP PETITIONS

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

APPLICATION FOR PATENT TERM ADJUSTMENT UNDER 37 CFR 1.705(d)

Applicants hereby petition for reconsideration of the Patent Term Adjustment (PTA) accorded the above-referenced patent application. The Issue Notification mailed December 30, 2008, for the above-referenced application indicates that the Patent Term Adjustment at issuance is 763 days. Reconsideration of the Patent Term Adjustment calculation to increase PTO Delay from 794 days to 1890 days, and to increase Total PTA from 763 to 1859 days, is respectfully requested.

REVIEW OF PATENT TERM ADJUSTMENT CALCULATION

A review of the Patent Term Adjustment History in the PAIR system shows that the United States Patent and Trademark Office (PTO) calculated the Patent Term Adjustment (PTA) as follows:

- 1) The PTO mailed a delayed 14-month first non-final Office Action on September 28, 2006, thereby according a PTO Delay of 762 days. Applicants do not dispute herein this patent term adjustment calculation for this PTO “A Delay.”

CERTIFICATE OF MAILING BY EFS-WEB FILING

I hereby certify that this paper was filed with the Patent and Trademark Office using the EFS-WEB system.

- 2) The PTO mailed a Final Rejection on April 26, 2008. Applicants filed a Request for Continued Examination on August 29, 2008. Applicants were accorded a delay of 31 days for the one month extension of time. Applicants do not dispute herein this patent term adjustment for Applicant Delay.
- 3) The application was filed on June 27, 2003, and the patent issued on December 30, 2008, more than three years later. The earliest Request for Continued Examination was filed on August 29, 2008. Only 32 days of PTO delay were calculated for issuance of the patent after three years from filing. Applicants respectfully submit that the PTO's calculation of this PTO "B Delay" contains an error and that the correct PTO Delay for issuance beyond three years from filing is 1890 days, as outlined further below.

REMARKS

Applicants have calculated the PTA in accordance with the clear intent of Congress. As outlined in *Wyeth v. Dudas* (*Wyeth et al. v. Jon W. Dudas*, U.S. District Court, D.C., CA No. 07-1492, Mem. Op. September 30, 2008), the only way that periods of time can "overlap" is if they occur on the same day, and if an "A delay" occurs on one calendar day and a "B delay" occurs on another, they do not overlap, and 35 U.S.C. § 154(b)(2)(A) does not limit the extension to one day. "A Delays" are defined as delays by the Office under 35 U.S.C. 154(b)(1)(A), which guarantees prompt PTO response. "B Delays" are defined as delays by the Office under 35 U.S.C. § 154(b)(1)(B), which guarantees no more than 3-year application pendency.

The PTA for the instant patent, as currently calculated and shown on the face of the patent, relies on the premise that the application was delayed under § 154(b)(1)(B) before the initial three-year period expired.

The *Wyeth* court determined that this construction cannot be squared with the language of § 154(b)(1)(B), which applies "if the issue of an original patent is delayed due to the failure of the United States Patent and Trademark Office to issue a patent within 3 years," and that "B delay" begins once the PTO has failed to issue a patent within three years, not before.

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In the current PTA calculation, the Office has only given credit for the larger of "A Delay" or "B Delay," rather than the combined sum of "A Delay" and "B Delay" (which does not include any days after three years from filing where "A" and "B" delays overlap).

In this patent, "A Delay" should be calculated as 794 days, and "B Delay" should be calculated as 1890 days. Thus, the total PTO Delay should be calculated as 1890 days.

In consideration of the events described above, Applicants believe the PTA calculation of 763 days is incorrect. As such, Applicants respectfully request reconsideration of the patent term adjustment in the following manner:

- 1) Total PTO Delay should be calculated as 1890 days;
- 2) Total Applicant Delay should be calculated as 31 days; and
- 3) Total PTA should be calculated as 1859 days.

Applicants note that this patent is not subject to a terminal disclaimer.

The fees in the total amount of \$200 are being paid concurrently on the Electronic Filing System (EFS) by way of Deposit Account authorization. Please apply any other charges or credits to deposit account 06-1050, referencing the attorney docket number shown above.

Respectfully submitted,

Date: 27 February 2009

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